

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34745

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| STATE OF IDAHO, |) | 2009 Unpublished Opinion No. 439 |
| |) | |
| Plaintiff-Respondent, |) | Filed: April 29, 2009 |
| |) | |
| v. |) | Stephen W. Kenyon, Clerk |
| |) | |
| JOSHUA LEE BOSIER, |) | THIS IS AN UNPUBLISHED |
| |) | OPINION AND SHALL NOT |
| Defendant-Appellant. |) | BE CITED AS AUTHORITY |
| |) | |

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael R. McLaughlin, District Judge.

First and second amended judgments of conviction for possession of a controlled substance, vacated. Case remanded.

Molly J. Huskey, State Appellate Public Defender; Merritt L. Dublin, Chief Appellate Unit, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Joshua Lee Bosier appeals from his first amended judgment of conviction revoking his probation and reinstating his sentence for possession of a controlled substance. Additionally, Bosier appeals from his second amended judgment of conviction granting his I.C.R. 35 motion for a reduction of sentence. For the reasons set forth below, we vacate Bosier's first and second amended judgments of conviction.

Bosier pled guilty to felony possession of a controlled substance, I.C. § 37-2732(c). In exchange for his guilty plea, the state dismissed additional charges, including an allegation that Bosier was a persistent violator. At that time, Bosier was involved in four different criminal cases in various stages before three different courts. The district court sentenced Bosier to a unified term of seven years, with a minimum period of confinement of three years. The district court suspended Bosier's sentence and placed him on probation for seven years. The district

court also ordered the sentence to run concurrently with Bosier's sentence in another unrelated case for which he had been placed on probation.

One month later, the district court summoned Bosier for another hearing. At that time, the district court explained that it was previously under the mistaken belief that Bosier had a retained jurisdiction opportunity in one of his other cases when, in fact, jurisdiction had been relinquished. The district court then entered an amended judgment of conviction sentencing Bosier to a unified term of seven years, with a minimum period of confinement of three years. The amended judgment of conviction had the effect of revoking Bosier's probation and reinstating the sentence of the original judgment of conviction. The district court ordered the sentence to run concurrently with all other sentences currently being served by Bosier.

One week later, Bosier wrote a letter to the district court alleging that it had revoked his probation without cause and asking the district court to reduce his sentence. The district court treated the letter as an I.C.R. 35 motion to reduce Bosier's sentence. After a hearing, the district court entered a second amended judgment of conviction modifying Bosier's sentence to a unified term of seven years, with a minimum period of confinement of two years. Bosier appeals. Specifically, Bosier challenges the revocation of his probation without notice or an adequate opportunity to be heard and the district court's refusal to further reduce his sentence.

Bosier argues that the district court denied his right to due process of law when it revoked his probation without notice or an adequate opportunity to be heard. Additionally, Bosier contends that the district court abused its discretion when it revoked his probation without finding that he had violated any term of his probation. Furthermore, Bosier argues that the district court abused its discretion by failing to further reduce his sentence pursuant to Rule 35 because his sentence is greater than necessary to accomplish the sentencing objectives and it is unreasonable under any view of the facts. The state concedes that Bosier was denied due process when the district court revoked his probation without proper notice or an adequate opportunity to be heard. However, the state further argues that the district court has discretion to revoke Bosier's probation even in the absence of an actual probation violation. Lastly, the state argues that Bosier's sentence is not unreasonable and that Bosier failed to present the district court with any new information in support of his Rule 35 motion showing that his sentence was excessive.

As noted above, the state concedes that Bosier's due process rights were violated when the district court revoked Bosier's probation and reinstated his sentence without notice and an

adequate opportunity to be heard. Therefore, we do not need to further address this issue. Accordingly, both the first and second amended judgments of conviction imposing prison terms must be vacated.¹

The district court violated Bosier's right to due process when it revoked his probation without notice and an adequate opportunity to be heard. Accordingly, Bosier's first and second amended judgments of conviction for possession of a controlled substance are vacated and the case remanded for reinstatement of the original probation.

Judge GUTIERREZ and Judge GRATTON, **CONCUR.**

¹ Bosier's second amended judgment of conviction which reduced the determinate portion of his sentence pursuant to Bosier's Rule 35 motion is necessarily vacated as it followed the first amended judgment of conviction which erroneously revoked Bosier's probation. Accordingly, the probation term of his original judgment of conviction is in effect, and we do not further address Bosier's argument that the district court erred by not further reducing his sentence pursuant to Rule 35.